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## RECENT DEVELOPMENTS IN DECLARATORY RELIEF

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### THE SITUATION IN PENNSYLVANIA

The way of the reformer, like that of the transgressor, is hard. It will be recalled that the Pennsylvania Supreme Court, after an excellent start in 1925 in the application of the procedure for a declaratory judgment in *Kariher's Petition*,<sup>1</sup> had fallen into regrettable error in a number of later cases<sup>2</sup> by assuming that a declaratory judgment could not be sought or granted when any other "established" remedy was available. This was in direct conflict with the express words of the Declaratory Judgments Act<sup>3</sup> to the effect that declaratory judgments may be rendered "whether or not further relief is or could be claimed", *i. e.*, whether further or coercive relief (1) is also claimed; (2) is not but could be claimed; or (3) is not and could not be claimed. Clearly possibilities (1) and (2) indicate that declaratory relief may be demanded cumulatively or in the alternative notwithstanding the fact that a common law or equitable remedy is also or might instead have been sought. In most of the Pennsylvania cases this was recognized, for in the vast majority of Pennsylvania cases some other remedy was available,<sup>4</sup> but the petitioner preferred and received a declaration of rights, which was appropriate and adequate relief. Yet the lack of judicial uniformity in the matter left the outcome of any particular litigation uncertain, for the objecting party would necessarily undertake to plead that another remedy was available, and the final position of the court in a particular case seemed unpredictable. Lawyers dislike judicial caprice, so that the doubt militated against widespread use of the declaratory judgment in Pennsylvania.

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1. 284 Pa. 455, 131 Atl. 265 (1925).

2. *In re Cryan's Estate*, 301 Pa. 386, 152 Atl. 675 (1930); *Nesbitt v. Manufacturer's Casualty Insurance Co.*, 310 Pa. 374, 165 Atl. 403 (1933); *Bell Telephone Co. of Penna. v. Lewis*, 313 Pa. 374, 169 Atl. 571 (1934), 82 U. OF PA. L. REV. 544.

3. Act of June 18, 1923, P. L. 840, § 1, 12 P. S. § 831.

4. BORCHARD, DECLARATORY JUDGMENTS (1934) 151; Borchard, *Declaratory Judgment in Pennsylvania* (1934) 82 U. OF PA. L. REV. 317, 322.

The courts had slipped into the error mentioned by misquoting what Chief Justice von Moschzisker, speaking with long historical authority, had stated in *Kariher's Petition*. Outlining the functions of the Act he had remarked that a declaratory judgment would not be entertained "where another *statutory* remedy has been specifically provided for the character of case in hand". This was in accordance with the best practice in England and the United States, for it was never intended that a declaratory judgment should be sought where the statute had provided a specific form of proceeding for a special type of case, like tax assessment, eminent domain, divorce, annulment of marriage, or other clearly defined type of issue. But in 1928, in *Leafgreen v. La Bar*,<sup>5</sup> the clear statement of Judge von Moschzisker was unintentionally distorted and he was charged with having said that a declaratory judgment would not lie where another "equally serviceable" remedy was available. This of course was something quite different; but by 1933 the phrase had been further transformed into a ground for dismissal where the question "can be litigated in the established course of legal and equitable procedure".<sup>6</sup> This was a far cry from the rigidly correct position of 1925 and not only departed from the terms of Section 1 of the Act and its usual construction, even in Pennsylvania, but if persisted in, would reduce the declaratory judgment to an extraordinary or exceptional remedy not invocable where another remedy was available.<sup>7</sup>

To correct this error and bring the Act back to its original meaning and purpose, Judge von Moschzisker, after retirement from the bench, drafted an amendment to Section 6 of the Pennsylvania Declaratory Judgments Act, which permitted the court to refuse a declaratory judgment where it "would not terminate the uncertainty or controversy giving rise to the proceeding", by expressing the rule above mentioned in precise detail. His amendment, which omitted the italicized appendix, read as follows:<sup>8</sup>

"Relief by declaratory judgment or decree may be granted in all civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which he has a concrete interest and that there is a challenge or denial of such asserted

5. 293 Pa. 263, 142 Atl. 224 (1928).

6. *Nesbitt v. Manufacturer's Casualty Ins. Co.*, 310 Pa. 374, 380, 165 Atl. 403, 405 (1933). In *Bell Telephone Co. v. Lewis*, 313 Pa. 374, 169 Atl. 571 (1934), the phrase used was "adequate remedy". But while correctly quoting Judge von Moschzisker's language concerning "another statutory remedy", the court erroneously concluded that mandamus is such a special statutory remedy.

7. It is of course proper not to grant a declaratory judgment where a pending case will decide the issue completely, or where it will not give complete or adequate relief, or where it is premature. See Pennsylvania cases cited in BORCHARD, *DECLARATORY JUDGMENTS* (1934) 151, 179.

8. Amendment of April 25, 1935, P. L. 72, § 1, 12 P. S. § 836 (Supp. 1935).

relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment or decree will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present; *but the case is not ripe for relief by way of such common law remedy, or extraordinary legal remedy, or where the party asserting the claim, relation, status, right, or privilege and who might bring action thereon, refrains from pursuing any of the last mentioned remedies. Nothing herein provided is intended to or shall limit or restrict the general powers or jurisdiction conferred by the act hereby amended; but proceeding by declaratory judgment shall not be permitted in any case where a divorce or annulment of marriage is sought.*"

By this amendment, without the italicized appendage, it was made clear that the only kind of "other remedy" which could bar the grant of a declaratory judgment was a special "statutory remedy" providing "a special form of remedy"<sup>9</sup> for a specific type of case", but the mere fact that there is available a "general common law remedy or an equitable remedy or extraordinary legal remedy whether such remedy is recognized or regulated by statute or not" shall *not* debar a party from the privilege of obtaining a declaratory judgment. That gives statutory expression to the law as judicially construed in the vast majority of English and American cases, and presents the only sustainable view.

But when the amendment came before the Committee on Judiciary General in the 1935 legislative session, some one, possibly out of a superabundance of good intentions, appended as a further amendment the italicized clauses at the end of the paragraph and thereby introduced a certain confusion which may militate against the confident resort to the declaratory judgment in Pennsylvania. It would have been better to let the courts work themselves out of the aberration of the *Leafgreen*, *Nesbitt* and *Bell Telephone* cases<sup>10</sup> than to risk confusing the whole Act. As written, the amendment is awkward and obscure and susceptible of varied interpretation.

Let us examine the italicized clauses. The last sentence of the original amendment had provided that the availability of a common law or equitable

9. The original term, special "jurisdiction", was, it is understood, changed in Committee to "special form of remedy", in order to bring the amendment into further conformity with the Act of March 21, 1806, P. L. 326, § 13.

10. Cited notes 2 and 5, *supra*.

or extraordinary legal remedy "shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present". Now comes the supplementary clause as a new thought, segregated by semicolons, with an apparent contradiction by seeming perhaps to qualify the availability of the declaratory judgment to cases where "the case is not ripe for relief by way of such common law remedy or extraordinary legal remedy". Does that mean that if the case is ripe for relief by way of common law remedy or extraordinary legal remedy—how about an equitable remedy?—then the declaratory judgment would not lie? The last clause of Judge von Moschzisker's original amendment had expressed exactly the opposite idea by the statement that notwithstanding the possibility of such remedies a declaratory judgment would lie. That was a complete sentence, and made further elaboration unnecessary. The opening word of the added amendment "but" might indicate a limitation on or contradiction to what had gone before. Yet there is internal evidence in the confusing appendix that its author did not intend it to act as a limitation, but rather as a specification of the cases in which the declaratory judgment could be used, thus reiterating what had already been indicated by Section 1 of the Act.

The second clause of the appendix

" . . . or where the party asserting the claim, relation, status, right or privilege and who might bring action thereon refrains from pursuing any of the last mentioned remedies"

would seem to restate in different words what the last part of Judge von Moschzisker's amendment had made indubitably clear, namely, that a declaratory judgment may be requested notwithstanding the availability of common law, equitable or extraordinary remedies. It therefore indicates that the author of the appendix did not intend by the first clause to limit the scope of Judge von Moschzisker's amendment, but to define further not only what the Judge had adequately conveyed, but to remind the profession, in addition, that the declaratory judgment could be used where the case is *not* ripe for relief by traditional remedies. That reminder was unnecessary and produced a sentence which puts a severe strain on the King's English. But the second clause indicates the author's constructive intentions, if not skillful draftsmanship. Obviously, if the plaintiff seeks a declaration when he might have sought a coercive remedy, he has refrained from pursuing his coercive remedy. That is a truism, and required no restatement. It is not clear whether the second clause beginning "or where the party asserting the claim", relates back to the words "but the case is not ripe for relief" or to the opening words of the whole long sentence beginning "where, however, a statute provides a special form of remedy for a specific type of case", or

to the later clause "where the other essentials to such relief are present". It would have made better English and avoided confusion if the appendix had begun with a new sentence reading:

"A declaratory judgment may be granted (a) when the case is not ripe for relief by way of common law or equitable or extraordinary legal remedy"—already adequately provided by Section 1—"or (b) when the case is ripe for such relief, but the petitioner refrains from requesting it"—already adequately stated in Judge von Moschzisker's amendment.

That the superfluous amendment was not intended to be destructive, may be inferred from the next sentence:

"Nothing herein provided is intended to or shall limit or restrict the general powers or jurisdiction conferred by the act hereby amended."

But the first clause of the supplementary amendment, approving the declaratory judgment when "the case is not ripe for relief" by traditional remedies, might be misconstrued into a disapproval of such use when the case is thus ripe for traditional remedies, unless the second clause may be deemed to repudiate this construction by presenting the two authorized uses of the declaratory judgment: (1) where the case is *not* ripe for a traditional remedy; (2) where it is so ripe. If this was the draftsmen's intention, as seems likely, it has been awkwardly expressed, and in view of the fact that Judge von Moschzisker had covered the ground he intended, it might have been preferable to avoid gilding the lily.

It is understood that the Judiciary Committee dispatched the amendment, as amended, because it assumed that the whole amendment had the approval of Judge von Moschzisker. The Act was signed by Governor Earle on April 25, 1935, and became Act No. 33 of the Session of 1935.<sup>11</sup> It might add to the utility of the original amendment and to the frequency and reliability of the employment of declaratory relief if the supplementary amending clauses were struck out. Even the last, denying declaratory relief for divorce and annulment of marriage, is not needed. Divorce and annulment of marriage—unless declaring null a marriage void *ab initio*—are not declaratory but constitutive judgments, for they set up a new legal relation rather than establish the existence of an old one. Besides, they probably involve in Pennsylvania special statutory proceedings and are hence excluded from the operation of the Declaratory Judgments Act.

#### THE AMENDMENT TO THE FEDERAL DECLARATORY JUDGMENTS ACT

Other misadventures have also recently beset the otherwise successful career of the declaratory action. The last Congress adopted an amendment

11. 12 P. S. § 836 (Supp. 1935).

to the Federal Declaratory Judgments Act designed to remove from the scope of the Act issues involving "federal taxes".<sup>12</sup> The need for this amendment was explained to the Committee by officials of the Government as arising out of the desire to prevent any interference with the collection of income taxes and with the administrative procedure adopted to adjudicate issues arising out of errors in tax assessments. The majority report from the Senate Finance Committee reads as follows:

" . . . The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment and collection of federal taxes.

"Your committee believes that the orderly and prompt determination and collection of federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors."

These allegations of the report deserve analysis. The first objection to the application of the Declaratory Judgments Act to taxes would seem to involve a suggestion that it conflicts with the policy of Section 3224 of the Revised Statutes,<sup>13</sup> prohibiting an injunction against the assessment or collection of any federal tax. It would seem better to encourage an early adjudication of the disputed question of tax liability, especially where the constitutionality of the operative statute is involved, than to insist on the collection of the tax and then have to undertake large-scale refunds. Government fears of financial embarrassment from the challenge of tax liability is more apparent than real; the embarrassment to both parties, Government and taxpayer, arises out of the delay in the adjudication of the issue, *i. e.*, out of the necessary uncertainty in the matter of legality and not out of the method of manifesting the challenge, whether by injunction, declaration or claim for refund.

The suggestion that the declaratory judgment would interfere with the orderly and prompt determination and collection of federal taxes "by a procedure designed to facilitate the settlement of private controversies" and "that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors" is open to several objections. The implication that the income tax was in issue is not accurate. So far as the writer is advised no challenge to income tax assessment had been attempted by declaratory action. If it had been, the decision of the courts should have been that there was a special statutory procedure provided for that type of issue which the declaratory judgment was not designed to alter or modify. What was really involved, it is understood, was not

12. Act of Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 STAT. 955; as amended Aug. 30, 1935, c. 829, § 405, 49 STAT. 1027, 28 U. S. C. A. § 400 (Supp. 1935).

13. 26 U. S. C. A. § 1543 (1935 ed.).

apparently stated to the Committee or by the Committee to the Senate. That was the challenge to the collection of the A. A. A. processing taxes and the penalty taxes under the Kerr-Smith Tobacco Restriction Act.<sup>14</sup> In the former cases many injunctions had been granted, notwithstanding Section 3224, on the ground that the exaction was not a tax but a penalty or coercive measure or that adequate relief was not afforded by a suit for refund; *a fortiori*, therefore, the milder declaratory judgment would have been appropriate. But in *Penn Bros. v. Glenn*,<sup>15</sup> a declaratory action was sustained against the collector of internal revenue, contesting the legality of the Kerr-Smith Act and the taxes to be collected under it, notwithstanding the objection of the Government that the only method of challenging the constitutionality of the tax and the Act under which it was collected, was to pay the tax first and then sue for its refund. Injunction was deemed inapplicable. Federal Judge Dawson, in the Kentucky District, held that the declaratory action was appropriate, since it was against the collector personally, that this was not an evasion of Section 3226 of the Revised Statutes<sup>16</sup> governing proceedings for refunds and that it was an efficient adjudication of liability, thereby avoiding complications arising out of prior payment to the Treasury as well as the subsequent proceedings. In the matter of state taxes, a declaratory action establishing liability had previously been deemed an appropriate middle road between the prohibited injunction on the one hand and the expensive suit for the recovery of an already paid tax on the other.<sup>17</sup> The federal amendment, by Section 405 of the Revenue Act of 1935, was made applicable "to any proceeding now pending in any court of the United States," in order apparently to strike down the decision in *Penn Bros. v. Glenn* and the few declaratory judgments on the A. A. A. processing taxes. Ultimately the Kerr-Smith Tobacco Act was repealed at the request of the Administration after the A. A. A. taxes had been held unconstitutional on injunction proceedings.

How the Government officials who advised the Senate Finance Committee acquired the idea that the declaratory procedure was designed to facilitate the settlement of "private" controversies but not "public" controversies, it is not easy to surmise. There was no justification for such a belief and the Committee was misled. Experience would indicate that the declaratory judgment is used very commonly in England and the United States to challenge the validity of public action whenever it affects the rights or claims of private individuals or other public bodies.<sup>18</sup> It has been especially

14. Act of June 28, 1934, 49 STAT. 778, 7 U. S. C. A. § 751 (Supp. 1935).

15. 10 F. Supp. 483 (1935).

16. 26 U. S. C. A. §§ 1672-3 (1935 ed.).

17. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1933). See also *Gully, State Tax Collector of Mississippi v. Interstate Natural Gas Co.*, — F. (2d) — (C. C. A. 5th, decided Feb. 10, 1936).

18. Jennings, *Declaratory Judgments Against Public Authorities in England* (1932) 41 YALE L. J. 407; BORCHARD, *DECLARATORY JUDGMENTS* (1934) 590 *et seq.*, and as to taxation,

useful in tax questions where the issue was the duty to pay, the jurisdictional powers of the administration, the immunity of the plaintiff from particular assessments by reason of the nature, or situs of, or interest in, or use or contractual exemption of the property or person, or the propriety of a classification or administration of the tax, where there has been actual or threatened illegality or error, *e. g.*, in the Government's failing to comply with the statutory or lawful requirements for a valid assessment, in the matter of valuation, tax rate, mode of assessment, amounts claimed, incidence of the tax, discrimination, deductions allowed, time for appeal and similar matters. In all these cases the issue has been narrowed to the precise question on which tax liability or exemption depends.

On the other hand, insofar as a federal income tax assessment or tax errors are concerned, the procedure of the Board of Tax Appeals, where applicable, must necessarily be followed. There was no case for this procedure in *Penn Bros. v. Glenn* or in the processing tax cases. The advance of that ground as justification for the amendment seems therefore misleading and irrelevant. An argument can be made for the point that the prohibition against injunction should not be avoided by a suit for a judicial declaration of non-liability.<sup>19</sup> Yet the policy of Section 3224 is so questionable that a legitimate way to escape it and secure speed of adjudication might not incur judicial disapproval. But the amendment, while suggesting that the declaration was a circumvention of Section 3224 in the matter of income tax assessment, a ground hardly sustainable in fact, goes much beyond the reason advanced in its support and denies the possibility of challenging federal taxes of any kind on any ground by declaratory action. This is a misfortune.

The report of the minority of the Senate Finance Committee reads as follows:

"Income and estate tax liabilities may now be determined prior to the payment of any asserted deficiency, by the Board of Tax Appeals, an impartial tribunal composed primarily of experts, which for many years has heard and decided controversies between the government and taxpayers upon the merits and judicially.

"However, no similar method is available for determining additional liabilities for miscellaneous internal revenue taxes proposed by the Bureau of Internal Revenue—unless it is the declaratory judgment law. A few courts have decided, and, we think properly, that the declaratory judgment law permits a determination of liabilities for these taxes. We believe that any doubt should be removed and that the declaratory judgment law should be specifically amended to make it

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619 *et seq.*; *Whitcher v. State*, 181 Atl. 549 (N. H. 1935); *La Franchi v. City of Santa Rosa*, 52 P. (2d) 558 (Cal. 1935); *State ex rel. Miller, Atty. Gen. v. State Board of Education*, 52 P. (2d) 141 (Idaho 1935).

19. See Note (1935) 44 YALE L. J. 1451.



applicable to all taxes not within the jurisdiction of the Board of Tax Appeals. As an alternative, we recommend that the Board of Tax Appeals be given jurisdiction to determine liabilities for all miscellaneous internal revenue taxes prior to payment of asserted additional taxes."

The minority, apparently realizing that income taxes were not really involved in the amendment, was opposed to it on the ground that the issues arising out of the exaction of the miscellaneous taxes which it covered required for their adjudication either the declaratory action or a specific form of statutory relief similar to that of the Board of Tax Appeals. It required no amendment of the Declaratory Judgments Act, however, as the minority assumed, to permit of its application to miscellaneous federal tax statutes and exactions. Had the Act been left alone, it would have enabled both Government and taxpayer to place in issue for speedy adjudication the manifold legal questions arising out of such statutes. Other federal governments, notably Australia and Canada, appear to have found such procedure useful; it has been found so in our states; but it may no longer be applied to federal taxes unless the amendment is repealed.

#### SOME RECENT MISCONSTRUCTIONS OF THE DECLARATORY JUDGMENTS ACT

Further missteps occurred in three recent cases, one state, two federal. In the case of *Brindley v. Meara*<sup>20</sup> the Indiana Supreme Court erroneously held that the "further relief" which may be claimed in connection with or as supplementary to a declaratory judgment, if needed, (Section 8 of the Uniform Act) means "further *declaratory* relief" and not coercive or executory relief, for if it meant the latter, the Declaratory Judgments Act would be broader than its title and hence unconstitutional under the Constitution of Indiana; that it would be providing "a new and additional remedy" in cases where there was an existing remedy, and that the new Act hence could not be deemed "remedial" as Section 12 postulated; that it therefore must be assumed to apply only to cases in which there was no existing remedy. All these statements are unfortunate and an attempt has been made elsewhere to criticize them in detail.<sup>21</sup> The court revives the error of a few of the courts in considering declaratory relief not as an alternative but as an extraordinary remedy,<sup>22</sup> and would thus, in the face of section 1 of the statute,

20. 198 N. E. 301 (Ind. 1935); first trial in 194 N. E. 351 (Ind. 1935).

21. — Indiana Law Journal — (1936).

22. The correct rule was applied in *Hay's Committee v. Hay's Guardian*, 86 S. W. (2d) 313 (Ky. 1935); *School District No. 1, Multnomah County v. School District No. 45*, 37 P. (2d) 873 (Oregon 1934); *Kress v. Village of Watkins Glen*, 267 N. Y. 184, 196 N. E. 19 (1935); *Greenfield v. Board of City Planning Commissioners*, 45 P. (2d) 219 (Cal. 1935). The wrong view was taken in *Union Trust Co. v. Main & South Streets Holding Corp.*, 245 App. Div. 369, 282 N. Y. Supp. 428 (1935); *American National Bank & Trust Co. v. Kushner*, 162 Va. 378, 174 S. E. 777 (1934).

limit declaratory relief to cases in which no other remedy is available. Indiana might well adopt the amendment to Section 6 of the Act as originally proposed by Judge von Moschzisker in Pennsylvania. Obviously the "further relief" mentioned in Sections 1 and 8 means what the English call "consequential" or, in the United States, "coercive" or "executory" relief; otherwise the term would be meaningless. All that was meant by Section 8 was that if a declaratory judgment is defied or violated by the party charged, the successful party is not helpless but may invoke on petition the court's coercive order, a proceeding in which the original declaratory judgment is *res judicata*. It might also cover supplementary proceedings authorizing the assessment of damages in a case in which the right to damages had been declared, but in which it was not possible as yet to determine what the damages would be. The *Brindley* case before the Indiana Supreme Court was not of that character but brought into issue new operative facts not related to the original declaratory judgment; it was inappropriate to the supplemental relief contemplated by Section 8 and should have been dismissed on that ground and on the further ground that the unsuccessful party had not been served with notice of the second petition, as Section 8 indispensably requires. But there was no occasion to misconstrue the Declaratory Judgments Act by way of *dictum* as the court did; and the suggestion that Section 8 presents a "new" subject which introduces subjects broader than the title is novel, to say the least.

A further departure from what is believed to be sound construction is involved in two federal cases, both decided by Judge Otis in the Western District of Missouri. In the *Columbian National Life Insurance Co. v. Foulke*,<sup>23</sup> the decedent Foulke died while an accident policy was in force; his widow asserted that the death was accidental and claimed under the policy. Before the widow sued, the company sought a judicial declaration denying that the death was accidental and hence denying liability. The court considered such a proceeding "an amazing, a startling evolution in procedure" and doubted that the Federal Act could be construed to authorize "any person against whom a claim under any contract is asserted [to] sue him who asserts the claim and obtain a declaratory judgment that there is no [or that there is] liability on the contract." But the court was wrong, it is submitted.

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Judge Dawson in the case of *Penn Bros. v. Glenn*, 10 F. Supp. 483, 486 (1935) stated the correct rule, as follows:

"... counsel for the defendants argue that an action for a declaratory judgment is not maintainable where there is available another adequate remedy. While some state courts have so construed their state declaratory judgment acts, such is not the general rule, and, in my judgment, unless the act is so restricted by its terms, such a construction is not justified. There is neither expressed nor implied in the Federal Declaratory Judgment Act any such restriction upon its use; and this court is not warranted in writing into it any such restriction."

The inadequacy of declaratory relief to meet the plaintiff's needs is a quite independent ground for denial.

23. 13 F. Supp. 350 (W. D. Mo. 1936).

Debtors have sued creditors in an infinite variety of situations for a declaratory judgment that there was no liability or only a limited liability, and the claim having been made upon them, were not bound to await the pleasure of the creditor to obtain an adjudication on the legal relations between the parties.<sup>24</sup> To reach his conclusion that privilege or immunity from the claims of another was not a "legal relation" under Section 1 of the Federal Act, Judge Otis drew the inference that the term covered "the relation of master and servant, creditor and debtor, husband and wife, citizen and state, lessor and lessee, bailor and bailee, owner and thing owned . . . But the liability of one to another, as on contract, in tort, as liability to the state for a crime, are these liabilities legal relations? I think they are not." Again, it is submitted, Judge Otis was in error. While the conceded examples may involve legal relations the term was intended by its draftsman, as also explained by the Judiciary Committee of the Senate, to include not only "rights" but "other legal relations", i. e., jural relations, such as duties, privileges, powers, immunities, liabilities, and their correlatives.<sup>25</sup> When the Judge says, "It also seems clear to me that Congress did not intend to include 'liabilities' with the word 'rights' except to the extent that a declaration of a given 'right' in one might involve denial of a corresponding right in some other and to that extent the absence of liability to that other," he advances a ground for a conclusion the very antithesis of that which he reached. All that the insurance company wanted—and either party could have requested a jury under the Federal Act—was a declaration that the company was under no duty ("liability") to pay the widow on the policy because the risk was not covered by the terms of the policy. The company's "absence of liability" was the absence of "right" on the part of the widow. That could have been declared as easily when the company initiated the action as when she did, and unless there was some special hardship in pressing her to trial at the time there was no reason why the petition should have been dismissed on demurrer.<sup>26</sup> The Circuit Court of Appeals for the Fifth Circuit appropriately states, in the case of *Gully, Tax Collector v. Interstate Natural Gas Co.*,<sup>27</sup> that the opinion of Judge Otis is too narrow, and that the court is not in accord with his views.

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24. BORCHARD, DECLARATORY JUDGMENTS (1934) 334 *et seq.*

25. *Id.* 74 *et seq.*, 630. The statement "the legal liability of any person to another never is a part of the legal relation existing between them, although it may result from it under the law if a certain state of facts comes into being" is not well founded. The court had probably had no opportunity to examine the Hohfeldian legal analysis and terminology.

26. The judge admitted that the immunity from unlawful tax claims in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1933), cited note 17, *supra*, was a claim of right to be free from the claims of the state, but asserts that the "immunity from unfounded claims or suits by individuals is quite distinguishable". The supposed distinction is non-existent, except that the company's claim is also a claim of privilege or no-duty, freedom from the right of another.

27. — F. (2d) — (C. C. A. 5th, decided Feb. 14, 1936).

Judge Otis was equally in error in the case of *Aetna Life Ins. Co. v. Haworth*.<sup>28</sup> In that case the policy contained a provision obliging the company, subject to certain conditions, annually to pay the insured one-twentieth of the principal amount of the policy if he should become wholly and permanently disabled, and relieving the insured from payment of premiums after he had become so disabled. The insured did not pay the premium due June 1, 1934, on the ground that after that date he was wholly and permanently disabled, and thus relieved from further payment of premiums. Such disability the company denied, contending that the policy lapsed for non-payment of premiums, and thereupon sued for a declaratory judgment of the rights of the parties. The issue was whether the insured was "wholly and permanently disabled on June 1, 1934." Judge Otis admits that

"if that question can be decided now and is decided adversely to the insured's contention, the liability of the plaintiff definitely and finally will be limited to the ultimate payment of \$45. An alternative is that at the death of the insured (and that may be twenty years hence) the beneficiary will sue on the policy. If she then is able to prove that on and from June 1, 1934, the insured was wholly and permanently disabled, she will be entitled to judgment against the plaintiff for the full amount of the policy less indebtedness. The plaintiff fears that at the possibly remote date [when] such a suit may be brought the witnesses and evidence now to be had no longer will be available."

Inasmuch as the question of disability was an operative fact on the duty to pay further premiums and on the obligations of the company, and inasmuch as now was the time when the question of disability and the legal obligations consequent thereon could best be determined, instead of leaving the issue in suspense for perhaps twenty years, it seems strange that Judge Otis should so profoundly have misconstrued the Declaratory Judgments Act as to dismiss the petition because *mirabile dictu* the issue was not an "actual controversy", which the Judge seems to think cannot arise when conflicting claims are advanced out of court. Even if that were so—and it is not so—the parties have here brought their conflicting claims into court and the remark that the plaintiff company had no present "rights and other legal relations" is hard to understand. If there was no disability, as claimed, they had the right to the regular payment of premiums, non-payment of which was then not privileged. If there was disability, they have no right to the premiums and a duty to pay the policy in twenty instalments without further payment of premiums by the insured. These circumstances very definitely involve present rights and duties of both plaintiff and defendant and the Declaratory Judgments Act was designed to afford litigating parties declaratory relief in such cases. It may be hoped that Judge Otis's unfor-

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28. 11 F. Supp. 1016 (1935).

fortunate view of the scope and purpose of the Declaratory Judgments Act will be reversed by the Circuit Court of Appeals.

#### EVER-WIDENING USE OF DECLARATORY JUDGMENTS

And yet the declaratory judgment has some recent triumphs to record. The Act, usually in the form of the Uniform Act, was adopted in 1935 by five additional states: Missouri, Washington, Montana, Alabama, and New Mexico, thus bringing the number of states and territories that have adopted the Act to thirty-nine. It has had an ever-widening use in the states, and is becoming sufficiently familiar to the courts, if not to the bar, so that most of the courts no longer stop to remark on the special nature of the procedure and accept it as part of the regular forms of relief. When it has reached the stage of no longer exciting comment, as in England, it will have achieved its final success. Yet the commendable efforts to invoke it, both in traditional and untraditional fact situations, necessarily leads the courts into an analysis of its scope and purpose. In a few cases, as already observed, the courts have not availed themselves of experience and have given the remedy an unduly limited function. In most cases, however, the courts have manifested an understanding conception of its utility and have therefore promoted both the prophylactic and curative functions it was intended to fulfill. As these become better known and appreciated, it is likely that the remedy will receive ever-wider and more sympathetic acceptance. The United States Supreme Court, having given the remedy its blessing in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*,<sup>29</sup> has had occasion to perceive it among the prayers for relief in several recent cases.<sup>30</sup> It seems to have caused no surprise and while not the subject of extended consideration, has nevertheless evoked *dicta* which place the remedy in its proper setting. The Chief Justice in *Ashwander v. Tennessee Valley Authority*, said<sup>31</sup>:

"The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms it applies to 'cases of actual controversy', a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts."

The employment of the Federal Act in actual cases is probably of most immediate interest. Aside from the missteps of Judge Otis in the two cases criticized above, there is reason for gratification in the appreciative and

29. 288 U. S. 249 (1933), cited note 17, *supra*. See also *Nashville, Chat. & St. L. Ry. v. Walters*, 294 U. S. 405 (1935); *Wright v. Central Kentucky Natural Gas Co.*, 56 Sup. Ct. 578 (1936).

30. *Dismuke v. United States*, 56 Sup. Ct. 400 (1936); *Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. 466 (1936); *cf.* *United States v. West Virginia*, 295 U. S. 463, 474 (1935).

31. 56 Sup. Ct. 466, 473 (1936); *cf.* remarks by Stone, J., in *United States v. West Virginia*, 295 U. S. 463, 474 (1935).

understanding reception it has received in the federal courts. Thus far some thirty cases in the lower federal courts have been reported, with quite an additional number unreported. Attempts to dismiss the petition for declaratory relief on constitutional grounds have signally failed.<sup>32</sup>

Perhaps its most striking application has been in patent cases, and a few of the issues now susceptible of judicial relief by declaration warrant mention. Heretofore, and even now, when a patent has been allegedly infringed, the patentee might at his election and in his own time sue the alleged infringer or his dealers for an injunction with or without damages, with the further opportunity publicly to charge the infringement, warn the alleged infringer's customers of the patentee's intention to hold them liable also, and thus, without necessarily bringing suit, harass and threaten the alleged infringer and his customers into surrender of his claims and of his freedom to manufacture and sell. This intimidation might ruin or seriously injure a manufacturer, after he had gone to the expense of building up a business; and thus the patentee might, without risking an unfavorable adjudication on his patent, obtain all the benefits of an unassailable patent, such as a settlement on his own terms. He might, in order to make his threat and intimidation more effective, commence an action for infringement, yet before the case was reached for trial and after several postponements request dismissal without prejudice, a possibility in most federal districts. He might bring action against a remote dealer in the hope of obtaining a default judgment which he could then use effectively against his competitor; if the manufacturer attempted to intervene or if the defendant dealer contested the suit, he might then ask for dismissal without prejudice. Only when there was a flagrant abuse of the patentee's privilege, reaching the stage of what the courts would call unfair competition, did the harassed supposed infringer have any injunctive relief; but here it was necessary to prove that the patentee had a malicious intent to destroy the infringer's business or acted in bad faith, not always easy to prove; and even then the issue was limited to the alleged unfair competition and was not concerned with the validity of the patent or the issue of infringement.<sup>33</sup>

With the advent of the declaratory judgment, this patentee's opportunity for abuse of his privilege has received a mortal blow. It is now possible for an alleged infringer to initiate the action against the complaining patentee for a declaration that the patent is not valid, or if valid, that the alleged infringer is not in fact infringing. Or if the patentee has begun his suit for infringement, the defendant infringer can ask a counterclaim for a declaration of invalidity or non-infringement, and thus prevent the patentee from dismissing the suit without prejudice before the case has come

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32. *Zenie Bros. v. Miskend*, 10 F. Supp. 779 (S. D. N. Y. 1935), an excellent opinion by Patterson, J., cited in several later cases.

33. see Note (1935) 45 *YALE L. J.* 160.

to trial. This has proved a valuable adjunct to the armory of judicial therapeutics and is likely to afford speedy relief to harassed alleged infringers without prejudicing honest patentees.<sup>34</sup>

A novel and highly commendable use of the declaratory judgment was recently made by Judge Patterson in the district court for the southern district of New York.<sup>35</sup> The plaintiff and defendant were both New York corporations engaged in the blouse business. The defendant was the exclusive licensee of certain design patents recently obtained on blouses which the plaintiff had manufactured and advertised long before, to defendant's knowledge. The defendant, nevertheless, had notified plaintiff's customers that the plaintiff's blouses infringed defendant's patents, whereupon plaintiff sued for a decree (1) declaring defendant's patents void and declaring the plaintiff's privilege to manufacture without interference from defendant, and (2) restraining the defendant *pendente lite* and permanently from representing that plaintiff's blouses infringed the patents, and from threatening plaintiff's customers with infringement suits. The defendant did not deny plaintiff's prior use of the design, but denied that a federal court could grant a preliminary injunction in what was in essence a suit for unfair competition between citizens of the same state. Under the old law before June 14, 1934, this was unquestionably true. But inasmuch as since June 14, 1934, there is jurisdiction to grant the declaratory judgment prayed, which the court believed would under the flagrant facts certainly be granted, the court considered itself empowered to grant the preliminary injunction under the doctrine of *Hurn v. Oursler*,<sup>36</sup> because the federal and the non-federal relief arose out of the same state of operative facts and both were needed effectively to protect the plaintiff's right to sell its blouses. As the plaintiff's cause of action was deemed to be a single one with different grounds and multiple relief, the court entertained jurisdiction of the entire suit, especially as the grant of the declaratory judgment on the trial would, if further relief were needed, have warranted the grant on plaintiff's petition of an injunction, as a supplementary or ancillary remedy. It would indeed be awkward to compel the plaintiff, after obtaining his declaration of invalidity, to go to the state court and commence another suit for unfair

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34. *Zenie Bros. v. Miskend*, 10 F. Supp. 779 (S. D. N. Y. 1935); *Lionel Corp. v. De Filippis*, 11 F. Supp. 712 (E. D. N. Y. 1935); and decision of Moscovitz, J., Feb. 10, 1936, denying motion to dismiss, — F. Supp. — (1936); cf. *Automotive Equipment, Inc. v. Trico Products Corp.*, 11 F. Supp. 292 (W. D. N. Y. 1935); *Camp Shoe Machinery Co. v. Del-Mac Shoe Process Corp.* (S. D. N. Y. Equity 80-268), June 31, 1935, decision of Goddard, J., unreported. See Rossman, *Declaratory Judgments* (1935) 17 JOUR. PATENT OFFICE SOCIETY 1. On counterclaims, see *Celanese Corp. v. Essley Shirt Co.*, in equity, no. 79-385, decision of Hulbert, J., May, 1935, dismissing motion to strike out counterclaim; and *Harris, Counterclaiming for Declaratory Relief* (1935) 17 JOUR. PATENT OFFICE SOCIETY 244; and Note (1935) 45 YALE L. J. 160.

35. *Mitchell & Weber, Inc. v. Williamsbridge Mills, Inc., and Hyman* (March 18, 1936).

36. 289 U. S. 238 (1933).

competition. "To compel a person with a just grievance to chase from court to court and to delay relief for years would be a reproach to the law", says Judge Patterson. It would also be hazardous to begin in the state court the suit for unfair competition, for the validity of the patents, on which so much depends, could not be tried there. The decision is trail-blazing and opens vistas of further social service from the judiciary.

It is obvious that the Federal Declaratory Judgments Act was not designed to alter the jurisdiction of the federal courts as to parties, subject matter or amount in controversy. For that reason, it was unnecessary to retain in the Act a clause confining the power to grant declaratory judgments to cases within the jurisdiction of the federal courts. As an amendment to the Judicial Code, such a statement in the Act was superfluous. On several cases the courts have stated that the Act was applicable only to cases which by virtue of parties, subject matter or amount were already within the jurisdiction of the federal courts.<sup>37</sup>

A considerable employment for the Act was found in challenging by declaration various aspects of the New Deal, not merely as to the validity of the statutes themselves, but the legality of administrative action thereunder. Indeed, the challenge of public powers over the individual, citizen or taxpayer, has afforded the major federal occasion for the remedy in the first year of its existence. Reference has already been made to the cases in which the A. A. A. processing taxes were challenged by declaration. In several of these cases, the prayers for relief included an injunction, which was granted, so that the declaration became unnecessary,<sup>38</sup> although it was proper practice to seek a declaration also, for the injunction might have been denied on technical grounds and yet a decision on the declaration might have been rendered and would have served the primary objective of the plaintiff.<sup>39</sup>

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37. *Putnam v. Ickes*, 78 F. (2d) 223 (App. D. C. 1935); *Hary v. United Electric Coal Co.*, 8 F. Supp. 655 (E. D. Ill. 1934); *Mississippi P. & L. Co. v. City of Jackson*, 9 F. Supp. 564 (S. D. Miss. 1935) (no power to enjoin state rates in face of Johnson Act); *Streckfus v. Mayor*, 10 F. Supp. 529 (1935); *McAdoo v. Southern Pacific R. R.*, — F. (2d) — (C. C. A. 9th, 1936), *N. Y. Times*, March 10, 1936 (suit on \$1,000 gold bond lacks jurisdictional amount).

38. *Gold Medal Foods, Inc. v. Landy* (plus fifteen other cases), 11 F. Supp. 65, 68 (D. C. Minn. 1935); *cf. Inland Milling Co. v. Huston*, 11 F. Supp. 813 (D. C. Iowa 1935); *Danahy Packing Co. v. McGowan*, 11 F. Supp. 920 (W. D. N. Y. 1935); *Jones v. Viley*, 12 F. Supp. 476 (D. C. Idaho 1936) (after Act of Aug. 30, 1935); *Louisville Provision Co. v. Glenn*, 12 F. Supp. 545 (W. D. Ky. 1936) (after amendment of A. A. A. and Declaratory Judgment Act); *Lake Erie Provision Co. v. Moore*, 11 F. Supp. 522 (N. D. Ohio 1935); *Henrietta Mills v. Hoey*, 12 F. Supp. 61 (S. D. N. Y. 1935) (after amendment of Act); *Neild Mfg. Co. v. Hassett*, 11 F. Supp. 642 (D. C. Mass. 1935). *Cf. Socony Vacuum Oil Co. v. City of New York*, *N. Y. L. J.*, April 10, 1936 (App. Div.), holding invalid by declaration, while refusing injunction, a city sales tax on the combined price of gasoline plus the state tax.

39. *Black v. Little*, 8 F. Supp. 867 (E. D. Mich. 1934); *Vogt & Sons v. Rothensies*, 11 F. Supp. 225 (E. D. Pa. 1935). See *Interstate Natural Gas Co. v. Gully*, 8 F. Supp. 174 (S. D. Miss. 1934); BORCHARD, *DECLARATORY JUDGMENTS* (1934), 168 *et seq.*; *cf. Hurley v. Kincaid*, 285 U. S. 95 (1932).



The National Industrial Recovery Act,<sup>40</sup> the Kerr-Smith Tobacco Act,<sup>41</sup> the Public Utility Holding Company Act,<sup>42</sup> were likewise challenged by declaratory action. The invalidity of patents to land granted by the Secretary of the Interior and the claim that lands were open to homestead entry were asserted by way of declaratory relief.<sup>43</sup> The duty of the Collector of Customs to issue to certain steamships the necessary certificate authorizing them to engage in the coastwise trade was sought by an action for a declaratory judgment.<sup>44</sup>

The validity of a grant of tax exemption to a foreign corporation by a state was asserted and hence the propriety of an assessment in disregard of the claimed exemption denied in an important action by the *Interstate Natural Gas Co. v. Gully, Tax Collector*. The case was heard twice in the District Court,<sup>45</sup> and by the Circuit Court of Appeals in which the action for a declaratory judgment was given high praise.<sup>46</sup>

In private controversies, a few interesting cases have occurred. In contrast with the two insurance cases which Judge Otis decided,<sup>47</sup> District Judge Kennerly correctly decided a suit by an insurance company against the insured<sup>48</sup> for a declaration that the loss (an auto collision causing death and injury) out of which an insurance claim had been asserted, was not one covered by the policy (to insure against personal liability when the automobile was used on business) but was occasioned by the insured's breach of one of the covenants of the policy (permitting it to be used for pleasure by third person) and hence left the company free from liability. Actions

40. See *Boggus Motor Co. v. Onderdonk*, 9 F. Supp. 950 (D. C. Texas 1935).

41. See *Penn Bros. v. Glenn*, 10 F. Supp. 483 (W. D. Ky. 1935).

42. See *Consolidated Gas Co. v. Lamar Hardy*, U. S. Atty. (S. D. N. Y.) E 81/377 and three other cases, claiming immunity from registration, freedom from penalties and from denial of the mails; also unconstitutionality of Act. See opinion of Caffey, D. J., Feb. 22, 1936. Decree *pro confesso* as to part of complaint.

43. *Putnam v. Ickes*, 78 F. (2d) 223 (App. D. C. 1935).

44. *United Fruit Steamship Co. v. Durning, Collector*, — F. Supp. — (S. D. N. Y. Oct. 28, 1935, Patterson, J., unreported), now on appeal to C. C. A. 2d.

45. 4 F. Supp. 697 (S. D. Miss. 1933) (three-judge court); remanded to single judge by Supreme Court, 292 U. S. 16 (1934). Tried again before Holmes, D. J., 8 F. Supp. 174 (1934). In a similar case, *Memphis Natural Gas Co. v. Gully*, 8 F. Supp. 169, 173 (S. D. Miss. 1934), Holmes, J., remarked:

"This case which has consumed considerably more than a year in a futile legal wrangle over remedies, illustrates the necessity of procedural reform, and is an ideal one in which to give recognition to the recent Act of Congress. The plaintiff seeks relief from the financial peril of tax exactions of insolvent collectors acting without authority of law, and is entitled to a declaratory decree as to the validity of the asserted tax exemptions."

46. — F. (2d) — (C. C. A. 5th, decided Feb. 14, 1936), by Hutcheson, J. The assumption that a declaratory action is legal and not equitable is not well founded [*City of Orlando v. Murphy*, 77 F. (2d) 702 (C. C. A. 5th, 1935)], although in the particular case, a suit to enjoin and declare invalid defendant's action against plaintiff for money damages, a declaration was properly denied. The new Supreme Court rules will doubtless terminate this distinction between legal and equitable relief. The declaratory action is strictly neither one nor the other; it is *sui generis*. The view of Judge Kennerly in *Ohio Casualty Ins. Co. v. Plummer*, 13 F. Supp. 169 (S. D. Texas 1936), that the relief is of an equitable nature, is historically correct, but not wholly accurate.

47. See notes 16 and 21, *supra*, and text pertinent thereto.

48. *Ohio Casualty Ins. Co. v. Plummer*, 13 F. Supp. 169 (S. D. Texas 1936).

had already been begun by the administrator of the person killed and by those injured against the insured, and the company needed to know whether under its policy it was under a duty to defend these actions.<sup>49</sup> The court considered the case peculiarly susceptible to adjudication by declaration.<sup>50</sup>

Other interesting cases have dealt with the rights of stockholders under the articles of incorporation,<sup>51</sup> the validity of the sale of property under order of the court,<sup>52</sup> the effect of the disaffirmance of a lease by a receiver,<sup>53</sup> the power of a life-tenant to lease or mortgage property,<sup>54</sup> and the currency in which a bond is payable by the debtor.<sup>55</sup>

### CONCLUSION

It may be appropriate to close this survey of recent developments by a quotation from the opinion of the Circuit Court of Appeals in the case of *Gully v. Interstate Natural Gas Company*, decided February 10, 1936:

" . . . For while it may not be doubted that the Federal Declaratory Judgments Act is a purely remedial statute, and does not purport to, nor does it, add to the content of the jurisdiction of the national courts, it certainly does [not] purport to effect in cases where federal jurisdiction is present, and we think it does, effect thoroughgoing, remedial changes, by adding to the coercive or warlike remedies in those courts by way of prevention and of reparation, the more pacific and more prophylactic one of a declaration of rights. When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached . . .

"We are aware that the statute has been given a more restrictive cast, *Columbia Natl. Life Ins. Co. v. Foulke*, Fed. (2d) , D. C. W. D. Mo. We are not in accord with this view. We see no reason why the statute should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, to enable disputants as to whose rights there is actual controversy, to obtain a binding judicial declaration as to them before damage has

49. Cf. *American Motorists Ins. Co. v. Central Garage*, 86 N. H. 362, 169 Atl. 121 (1933); *Sun Indemnity Co. v. Triangle Furniture Co.*, Supreme Court of N. Y., by Valente, J. (1935), now on appeal to Appellate Division, First Department.

50. See also *Commercial Casualty Insurance Co. v. Humphrey*, 13 F. Supp. 174 (S. D. Texas 1936).

51. *Harr v. Pioneer Mach. Corp.*, 65 F. (2d) 332 (C. C. A. 2d, 1933). Begun as action for injunction, and retained by the court (prior to the Federal Act) in order to render declaratory judgment as proper equitable relief.

52. *Chase National Bank v. Pan American Petroleum Co.*, 9 F. Supp. 394 (S. D. Cal. 1935).

53. *American Brake Shoe & Foundry v. Interborough Rapid Transit Co.*, 10 F. Supp. 512 (S. D. N. Y. 1935) (by Mack, J.—a discriminating opinion).

54. *Murrell v. Stock Growers' Nat. Bank*, 74 F. (2d) 827 (C. C. A. 10th, 1934) (originally under Wyoming Declaratory Judgments Act).

55. *McAdoo v. Southern Pacific Co.* (C. C. A. 9th, N. Y. Times, March 10, 1936) (gold clause case); *Feist v. Société Intercommunale Belge d'Électricité* [1934] A. C. 161, *rev'd* [1933] Ch. 684.

actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required as a condition of granting ordinary preventive relief in equity. This relief, though before the enactment of statutes of this kind it was not of general wide-ness, is neither new nor strange in character. It has been granted numbers of times in construing instruments to give directions to trustees and others obliged to carry out written but doubtful directions. The purpose of the statute is, we think, wise and beneficent. It will, if applied in accordance with its terms, effect a profound, a far reaching, a greatly to be desired procedural reform. We see no sound reason for limiting it."